No. 11,194

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

BRIEF OF APPELLEES

Upon Appeal from the District Court of the United States for the District of Arizona

TERRENCE A. CARSON
219 Ellis Building
Phoenix, Arizona

STAHL & MURPHY

By FLOYD M. STAHL
JOHN A. MURPHY
822 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellees.

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CODES AND STATUTES

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APPELLEES' BRIEF

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I.

JURISDICTIONAL STATEMENT

The appellees concur in the statement of jurisdictional facts contained in appellant's opening brief.

II.

STATEMENT OF THE CASE

The statement as to the pleadings made in appellant's opening brief is correct, except the statement therein made that the third count of the complaint is substantially the same as the second count.

As is permitted by Rule 8(e)(2) of the Rules of Civi Procedure, the complaint sets forth three causes of actior or statements of claim. The first statement of claim does not anticipate the defense of a release, and really was the only statement of claim that it was necessary to set forth Like the other two statements of claim, it seeks recovery only for the injury to the femur or thigh bone of the plain tiff, Zoa H. Zane. The second and third statements of clain anticipate the defense of a release and set forth the rea sons that it was ineffective to release the claim of the plaintiffs on account of said femur or thigh bone injury The second statement of claim sets forth the lack of knowl edge of such injury on the part of the plaintiffs at the time of the release and further sets forth the misrepre sentations and fraud on the part of the agents of the defendant that caused the plaintiffs to believe that the only injury was the injury to the right foot and lowe leg. The third statement of claim, although similar in mos respects to the second statement of claim, differs from i in that it omits the allegations of actual or intentiona fraud on the part of the defendant.

It is, we believe, important to bear in mind that by each of the statements of claim contained in the com plaint of the plaintiffs, as well as by the instructions requested by them, recovery was sought only for the injury to the right femur or thigh bone of Zoa H. Zane which, it was claimed, the plaintiffs were led by the agents of the defendants to believe she did not have and that no recovery was anywhere sought for the in juries to the right foot or lower leg, or for any other injuries.

III.

STATEMENT OF FACTS

To the statement of facts contained in appellant's opening brief there should, we believe, be added the following:

When Zoa H. Zane arrived at the Coachella Valley Hospital at Indio she was in very profound shock and in a rather critical condition (361), and she was given blood plasma and morphine for pain (362). After the operation she was wheeled into a private room (90). Neither at the time she was taken to the hospital nor at any other time were any arrangements made by Mrs. Zane for her care or treatment at the hospital prior to the settlement, and she was not presented with any bills of the hospital or the doctor for hospital or doctor's charges (104, 105).

According to Mr. Earl F. Parks, Superintendent of the defendant, who was in the vicinity of the accident at the time it occurred, he had a talk with the deputy sheriff very shortly after the accident (353), and ambulances were dispatched to get the injured people into the hospitals (350). Shortly after the accident Mr. Parks was at the hospital to which Mrs. Zane was taken (344).

In the case of care and treatment of passengers injured in previous bus accidents the bills were paid by the Greyhound (398). Mrs. Zane was told by Dr. Blackman and by Mr. Cameron, the claim agent of the defendant, that she need not worry about the bills and that they would be taken care of by the Greyhound (92, 93, 95, 134).

Although during his first three or four visits to the hospital to see Mrs. Zane, which were about a week apart, the claim agent didn't ask her to name a figure, or name a figure himself, he was preparing his ground and told her about other cases he had settled and wanted her to make up her mind (96, 134).

While Mrs. Zane was in the hospital and in January, 1943, Dr. Blackman and Mr. Cameron had a conversation regarding the amount of the bill for hospitalization and doctor's services in which Mr. Cameron desired to make a settlement or agreement that the total bill would not exceed $1,000.00. Dr. Blackman refused to do this and wrote Cameron to that effect (111, 112, 388, 389). Mr. Cameron told Mrs. Zane that Dr. Blackman had agreed to take care of her for $1,000 and had changed his mind about it (112).

The hospital and doctor's charges up to the time of the settlement were paid by the defendant by a draft issued by its agent, the Western Adjusting Bureau, by Cameron, and drawn on the defendant for $1467, payable to Jack Zane and Zoa Zane and Coachella Valley Hospital and Dr. W. H. Blackman, which was indorsed and given to the hospital (396). The Coachella Hospital on February 19, 1943, the date of the settlement, issued a receipt to the Pacific Greyhound Lines acknowledging receipt from the Pacific Greyhound Lines of $1467 for hospitalization and doctor's care of Mrs. Zoa H. Zane from December 11, 1942, to February 19, 1943 (118, 119). After the settlement Mrs. Zane remained in the hospital from February 19 to March 8, 1943, and the charges of $140.90 for this period were paid by her (396, 117, 119). Up to the time of the settlement Mrs. Zane occupied a

private room to which she was taken after the operation without any arrangement having been made by her for this (104, 124). After the settlement was made, upon her suggestion, she was moved into a ward and stayed there for the remainder of the time she was in the hospital (124).

Mr. Cameron, the claim agent, prior to the settlement, told the plaintiff, Zoa H. Zane, that Dr. Blackman was their doctor, that he had handled cases for them and was a good doctor, and that she could rely on anything Dr. Blackman told her (98). He further told her and her husband that the only injuries she had was the amputation of the right foot and lower leg and that she would be able to wear an artificial limb and be as good as new (106, 198), that her injury was more or less temporary and that within a few months she would be able to wear an artificial limb, and be up and doing the same things she did before (98). Dr. Blackman made similar representations to Mrs. Zane both in the presence of Mr. Cameron and alone (106, 107, 406, 383-385).

Cameron also told Mrs. Zane that the doctor had assured him that all that was the matter with her was the amputation of her foot and leg (109). At the time of the settlement Cameron said to the plaintiffs that it was a very good settlement for this loss (108, 198), and Dr. Blackman also so told Mrs. Zane (109).

The evidence is overwhelming that as a result of the accident there was a fracture of the neck of the right femur or thigh bone of Zoa H. Zane which was not known to her or her husband until long after the settlement, or until the last part of August, 1943 (113-115, 117, 124, 174, 190, 191, 209, 213). By reason of this injury Mrs.

Zane will be unable to wear an artificial limb, but will always have to use crutches (160, 161, 215).

The plaintiffs believed and relied upon the representations made to them by the claim agent and the doctor that the only injuries were those to the right foot and lower leg and that Zoa H. Zane could use an artificial limb, and they would not have signed the release had it not been for such belief and reliance (109, 201, 181, 182).

Some time prior to the conclusion of the settlement, the claim agent left with Mrs. Zane a form of release ready to be signed in which the amount of the settlement was stated to be $14,500, and in which the injuries were described as the loss of the right foot and lower leg (102, 175, 176). When the claim agent came to conclude the settlement he took this release which had not been signed and said that he was going to the office. He soon returned and handed Mrs. Zane a release to sign which she was led to believe and believed was the release he had previously left with her and had taken with him (103, 104, 141, 175-177). The release that was handed to her for signing and that actually was signed stated the amount to be $15,967 and the injuries to be personal injury and property damage (143).

The facts will be further elaborated in the argument.

IV.

ARGUMENT

The California Statute

In the second and third statements of claim contained in the complaint we set forth Section 1542 of the Civil

Code of California which provides that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him, must have materially affected his settlement with the debtor (12, 17, 18). This statute has been held by the California courts to apply to releases of claims for personal injuries resulting from an accident. *O'Meara v. Haiden,* 204 Cal. 354, 268 Pac. 334; *Hudgins v. Standard Oil Co.,* 136 Cal. App. 44, 28 P. (2d) 433; *Backus v. Sessions et al.,* 110 P. (2d) 51, (Sup. Ct.).

We disagree with the statement of counsel for appellant that the release here involved is not a general release within the meaning of the statute. Certainly a release that provides for the release of a party from all claims and demands that a party now has or may hereafter have is a general release. The further provision that the release applies to all claims of every kind and nature, known or unknown, suspected or unsuspected, and waives the provisions of the section of the Code does not change the general character of the release, but, on the other hand, makes the release even more broad and general. A similar release was characterized as a general release by the California Supreme Court in *Backus v. Sessions,* 110 P. (2d) 51.

It is true, as stated in appellant's brief, that our requested instruction No. 7 (46-47) based partly upon the Section of the California Code was withdrawn. The reason for this was that this instruction was predicated on the right of the plaintiffs to recover, if, at the time of the execution of the release, the injury to the femur or thigh bone was not known, and although there were misrep-

resentations or fraud. In view of the seemingly conflicting state of the decisions of the California courts on the question, and inasmuch as the evidence clearly showed misrepresentations and fraud, we considered that there was no reason to rest our case on an instruction predicated on the absence of fraud or misrepresentation, when these elements had been established by the evidence. We did not, however, abandon the claim of the applicability of the statute to the release here involved, and we believed and still believe that the giving of the instruction would have been proper.

The only decision of the Supreme Court of California directly passing on the question is that of *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334.

The release in this case provided that the defendant was released from any and all actions, claims and demands for or by reason of any damage, loss or injury which theretofore might have been or which thereafter might be sustained in consequence of the accident, and by the release the releasor bound himself to indemnify and hold harmless the release from any loss he might be obliged to pay in the future in reference to the accident. As a result of the accident the party injured had an abscess of the spleen which was not known to any of the parties at the time of the execution of the release. There was no claim of any fraud or misrepresentation. The court cited and quoted Section 1542 of the Civil Code and held that, on account of the fact that the injury to the spleen was not known to the parties, recovery could be had for the results of this injury. It is to be noted that, while not using the words "whether known or unknown," the re-

lease in the *O'Meara* case was to the same effect as though those exact words had been used. As to this the court said:

> "Accordingly, although the release may purport upon its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality, it does not do so. Section 1542, Civ. Code."

The case of *O'Meara v. Haiden,* supra, was followed in the later cases of *Gambrel v. Durensing,* 127 Cal. App. 593, 16 P. (2d) 284, and *Hudgins v. Standard Oil Co.,* 136 Cal. App. 44, 28 P. 433, and was approved in the case of *Backus v. Sessions,* 110 P. (2d) 51 (Cal.).

In the *Gambrel* case, supra, while the release did not expressly state that it covered all known and unknown injuries, it did state that it released the release from all claims and demands arising out of the accident. The court held that, irrespective of the question of fraud, as there was a mistake of the parties as to the injury upon which the action was predicated, recovery could be had for such injury.

In the case of *Hudgins v. Standard Oil Co.,* supra, the release contained the same wording as the release in the case at bar and provided that it extended to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and that all rights under Section 154 of the Civil Code of California were expressly waived. The court held that the mutual mistake of the parties as to the injuries would avoid the release.

Although the case of *Backus v. Sessions,* 17 Cal. (2d) 380, 110 P. (2d) 51, decided by the Supreme Court of California, involved other matters, such as the competency of the releasor at the time of the execution of the release,

the court expressly approved and confirmed its previous decision in the case of *O'Meara v. Haiden,* supra, and treated the language of the release in the case as covering all known and unknown injuries. In doing so, the court said:

> "O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, is controlling here. There the action was for wrongful death of a minor occurring seven months after the accident, caused by an injury to the spleen. The defense was a release of all known and unknown damages given prior to the minor's death. * * * This court held the release did not cover the damages for the death resulting from the injury to the spleen, stating at page 360 of 204 Cal. at page 337 of 268 P., 60 A. L. R. 1381:
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> > "'It appears, therefore, beyond question, that at the date of the release the injury which was the cause of the boy's death was not known to either party. It was not in the minds of the parties at the time of settlement which resulted in the execution of this written release. Accordingly, although the release may purport on its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality, it does not do so. Section 1542, Civ. Code.'"

The case of *Berry v. Struble,* 20 Cal. App. (2d) 299, 66 P. (2d) 746, cited by counsel for appellant, did not involve an unknown injury, but involved unanticipated consequences of a known injury. It further did not appear that there was a mutual mistake. The court, although it did not place its decision on that ground, stated that there was evidence tending to show that the plaintiff was not suffering from an unknown injury when the release was

executed. The facts of the case are distinguishable from the facts in the case of *O'Meara v. Haiden,* supra, and from the facts in the case at bar, in that, in the case of *Berry v. Struble,* supra, there was not an unknown injury, but only unanticipated results of a known injury, and, further, in that the facts did not show a mutual mistake. The court stated that in the case of *O'Meara v. Haiden,* supra, the release did not contain a provision that it should apply to all unknown injuries, but this was not the case, and is contrary to the statement of the California Supreme Court in the case of *Backus v. Sessions,* supra, above quoted, which treats the provision of the release in the *O'Meara* case as applying to all known and unknown injuries.

In the case of *Berry v. Struble,* supra, as well as all the above cited California cases, with the exception of the case of *Backus v. Sessions,* supra, there was no element or claim of misrepresentation or fraud, either actual or constructive.

Counsel also, in this connection, cited in their brief the case of *Jordan v. Guerra,* (Cal. App.) 136 P. (2d) 367. Not only did that case not support the rule claimed by the appellant, but also the case was overruled by the California Supreme Court in the case of *Jordan v. Guerra,* 144 P. (2d) 349.

II.

Even if there were no misrepresentations or fraud on the part of the defendant, the plaintiffs were entitled to recover on the ground of mutual mistake.

As we have shown, in the case of *Berry v. Struble,* 20 Cal. App. (2d) 299, 66 P. (2d) 746, being one of the

cases upon which appellant has relied, not only was there no claim of misrepresentation, but also there was not even any claim of mutual mistake. In that case, also, there was only a single injury to the leg that turned out to be more serious than the plaintiff considered it to be at the time of the release, and there was not an injury to another part of the body that was unknown.

In the case of *O'Meara v. Haiden,* 204 Cal. 354, 268 P. 334, the facts showed a mutual mistake and also that there was a distinct injury that was not known to the parties and which neither of them had in mind when the settlement was made, and it was held that the plaintiff was entitled to recover.

In accord with this decision, and in accord with the decisions of many other courts, this court held in the case of *Great Northern Ry. Co. v. Reid,* 245 F. 86 (9th Cir.), that, no matter, how broad and inclusive the terms of a release may be, it will not be held to include a particular injury that was serious and was then unknown to both parties. In so holding, the court said:

> "The release itself is as broad as it could be made, acquitting the company of all liability arising on account of the injuries received by appellee, whether then appearing or growing out of the same development in the future, or arising or to arise out of any and all present injuries sustained at any time or place while in the employ of the Railway company prior to the date of the release. In such a release, however, the general language will be held not to ininclude a particular injury, then unknown to both parties, of a character so serious as to indicate that, if it had been known, the release would not have been

signed. This was the conclusion reached in Lumley v. Wabash R. Co. (C.C.A. Sixth Circuit) 76 Fed. 66, 22 C.C.A. 60. See also Tatman v. Philadelphia B. & Wr. Co. (Del CH) 85 Atl. 716.''

Many other cases so holding that a mutual mistake is sufficient to prevent a release from covering unknown and distinct injuries are found in the annotations in L.R.A. 1916B, 776, 48 A.L.R. 1471 et seq. and 117 A.L.R. 1030 et seq.

We believe that, irrespective of statute, this general law is the law both in California and in Arizona. We have here, however, a much stronger case than one where there was only a mutual mistake since, in the case at bar, the mistake of the plaintiffs as to the injuries was induced by misrepresentations of the defendant.

III.

Regardless of the provisions of the release the plaintiffs were entitled to recover for the injury to the femur of Zoa H. Zane by reason of the representations that her only injury was the injury to the right foot and lower leg that necessitated the amputation.

Misrepresentations and fraud inducing the execution of the release were clearly proved by the evidence. In view of this, we submit that, under the authorities, the plaintiffs unquestionably had the right of recovery for the unknown injury which it was represented to them Mrs. Zane did not have.

The evidence is clear and beyond question that it was stated and represented to the plaintiffs by the claim agent and the doctor that the only injury was the injury

to the right foot and lower leg, which necessitated the amputation and that the plaintiff would be able to wear and use an artificial limb and to get around as well as she could before the accident.

The evidence is also clear and beyond question that these representations were believed and relied upon by the plaintiffs and that they were thereby induced to make the settlement and to execute the release, and that they would not have made the settlement or executed the release had it not been for such belief and reliance. The representations very clearly were employed and used in the settlement negotiations and were instrumental in causing the settlement to be made.

There is no basis whatsoever for the statement on page 38 of appellant's brief that it is apparent that, even if the plaintiffs knew that Mrs. Zane had a fractured hip, they still would have made the settlement. The same applies to the statement on the following page that the evidence is very persuasive that the fracture of the femur discovered in August, 1943, did not exist while Mrs. Zane was in the Indio Hospital. The evidence is overwhelmingly to the contrary (113-115, 117, 124, 174, 190, 191, 209, 213). It is clear and beyond question, as is shown by the foregoing references to the Transcript, that the representations so made to the plaintiffs were false and untrue and that, in the accident, she sustained an injury to the right femur resulting in a fracture and non-union, which will prevent her from using an artificial limb and will cause her to be a hopeless cripple and to be unable to walk without crutches during the remainder of her life.

It is true that, except in the matter of the substitution of releases, which we later shall discuss, we did not request an instruction based on actual or intentional fraud. Counsel for the defendant, however, did ask for such instruction setting forth all the various elements of intentional fraud (51) and this instruction was given (451, 452). We believe that, under the California Code and under the general law, actual or intentional fraud in connection with the making of the misrepresentations can very well be inferred from the evidence, as we later shall show.

In any event, under the authorities, whether the misrepresentations were innocently or intentionally made is not material. If they were innocently and unintentionally made, this constituted constructive fraud, which has the same effect and results as actual or intentional fraud. In Vol. 8, Words and Phrases, page 119, numerous cases are collected defining and stating the rule as to constructive fraud, from which we quote the following:

> "'Constructive fraud' is a term evolved to designate what is in the essence the receipt and retention of unwarranted benefits through misrepresentation. Herwig v. Harris, 175 A. 169, 172, 117 N. J. Eq. 146.
>
> "'Constructive fraud' is a term applied to a great variety of transactions which equity regards as wrongful, and to which it attributes the same effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of actual fraud." Douglas v. Ogle, 85 So. 243, 244, 80 Fla. 42.
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> "'Constructive fraud' exists where conduct, although not actual fraud, ought to be so treated, that

is, in which such conduct is constructive or quasi-fraud having all the consequences and legal effect of fraud." Younglove v. Hacker, 59 P. (2d) 451, 15 Cal. App. (2d) 211.

Although in some of the cases there is rather loose language in applying the terms "mutual mistake" and "constructive fraud" it obviously is not the case, as stated by counsel for appellant, that constructive fraud is nothing more than mutual mistake. In a case of this kind, in addition to a mistake of both parties, it involves a misrepresentation made by one of the parties that induced and caused the other party to be misled as to the injuries sustained. Such misrepresentations are held by the authorities to constitute constructive fraud and to have the same effect and results, whether intentional or not. This case is not a case simply of mutual mistake, but it goes further than that. We have here a case where the mistaken belief of the plaintiffs that Mrs. Zane had no other injury except that to her foot and lower leg was induced and caused by the misrepresentations of the defendant. It is our position that in cases where there have been misrepresentations as to the injuries and a release is executed under the erroneous belief induced by such misrepresentations that only a certain injury existed, while as a matter of fact there was another serious injury, such release cannot be claimed or held to cover such other injury which the releasor had been led by the releasee to believe did not exist. As to such injury, the release is ineffective. In such a case it makes no difference how broad or inclusive the language of the release may be or what it may contain.

Counsel for appellant apparently make the claim that if a release is executed that by its express wording covers known and unknown injuries, the claimant is barred and estopped from recovering for the unknown injuries even though statements and representations were innocently made to the claimant that there were no other injuries and these statements and representations were absolutely false. Although counsel state that this is the rule by the overwhelming authority, they have not cited a single case that supports it. We shall discuss the four cases cited on page 34 of the brief as representative of this claimed "overwhelming authority."

The first case is that of *Hanson v. Northern States Power Co.*, 198 Minn. 24, 268 N.W. 642. In this case there was no element whatsoever of constructive fraud. No statements or representations were made to the claimant as to her injuries. There was not even a mutual mistake. The court said that the mistake, if any, was on the part of the plaintiff alone. The defendant had not had the plaintiff examined or contacted her or had any discussion with her regarding her injuries. In this connection the court said:

> "They did not have her examined, nor did they contact her for the purpose of discussing and determining whether she had suffered injuries or the extent or nature thereof. * * * They were obviously interested in getting from her a release as to all claims she might have before settling with her husband. While it may be that the plaintiff was mistaken as to her injuries at the time of signing the release, the mistake, if any, was not shared by the defendants, and therefore, as a matter of law there was

> no mutual mistake. * * * As the unilateral mistake under which plaintiff was laboring was in no way due to the fraud or other misconduct of the defendants or their agents, that fact likewise is no ground for vitiating the release."

It will be seen that in this case there were no untrue statements or representations and there was not even a mutual mistake. The court, however, had the following to say of a situation involving a mutual mistake.

> "We have no quarrel with plaintiff's contention that where the parties, with their attention directed to known injuries, contracted with reference thereto in ignorance of other and more serious injuries, both parties believing the known injuries are the only ones sustained, there is mutual mistake and a release executed under such mistake is no bar to an action for the unknown injuries. Richardson v. Chi., Milwaukee & St. P. Ry. Co., 157 Minn. 474, 196 N.W. 643, Mix v. Downing, 176 Minn. 156, 222 N.W. 913, Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001. It is also true that this court has indicated that even though a release expressly includes unknown injuries, such expression is not conclusive, and mutual mistake may be shown for the purpose of vitiating the agreement. Nygood v. Minneapolis St. Ry Co., 147 Minn. 109, 179 N. W. 642."

Under this decision, there can be no question as to what the holding of the Minnesota court would be in a case where there not only was mutual mistake, but where also the mistake on the part of the plaintiff was caused by untrue statements and representations of the defendant.

The next case cited by counsel, being the case of *Moses v. Carver,* 298 N. Y. Supp. 378, 164 Misc. 204, likewise not only does not support appellant's claim but directly sustains our position. The release in this case purported to discharge the defendant from liability for all claims, losses or injuries, "whether developed or undeveloped, resulting or to result from the accident." It also set forth that the injuries had been represented to be permanent and progressive and that the releasors relied wholly on their own judgment, belief and knowledge as to the injuries. The release, as was stated by the court, was designed to cover not only future effects or developments of the injury but unknown injuries existing at the time which were not taken into consideration.

Actual fraud in procuring the release was not claimed. The court held that the release could not be set aside or cancelled because of mutual mistake but, directly opposed to appellant's claim that mutual mistake and constructive fraud are the same thing and that a release is not effected by representations innocently made, the court held:

> "Proof of actual fraud is not necessary to rescind a contract which has been consummated through misrepresentation of material facts not amounting to fraud. Bloomquist v. Farston, 222 N. Y. 375, 118 N. E. 855.
>
> "Equity will, in a proper case avoid and set aside a transaction induced or produced through material misrepresentations and false statements, although the statements and representations were honestly made, with no intent to deceive. Leary v. Geller, 224 N. Y. 56, 120 N. E. 31; Matter of Smith, 243 App. Div. 348, 353, 276 N. Y. S. 646. * * *.

> "It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, and this rule applies to actions at law based upon recission, as well as to actions for rescission in equity. Seneca Wire & Mfg. Co. v. B. Leach & Co., 247 N. Y. 1, 159 N. E. 700."

In this New York case, cited by counsel for appellant, the plaintiff was held to be entitled to recover although the release expressly purported to cover all unknown injuries and although there was no actual fraud, and it is strongly and directly in our favor.

The third of the four cases cited by counsel for appellant as representative of the "overwhelming authority" claimed by them is the case of *Hoffman v. Eastern Wisconsin R. & Light Co.,* 134 Wis. 603, 115 N. W. 383. The release involved acknowledged "full payment and satisfaction of all claims which I now have, or may hereafter have" by reason of the injuries received in the accident, "said injuries then and there received, as claimed by me, being right limb, contusion, head struck, shook up badly, and further, by reason of said accident and collision, I was otherwise bruised and injured."

The only issue submitted to the court was one of construction as to whether or not the release *by its words* covered a condition of the ovary that later developed. The court held that the language of the release was sufficiently broad to cover this condition. There was no question in the case as to fraud, misrepresentations, or mutual mistake. The court said:

> "There is no question of fraud, and no suggestion of mutual mistake as to the harm that might develop from the injuries plaintiff had received."

It is obvious that this case has no bearing whatsoever on the matters here involved.

The same is true of the case of *Quebe v. Gulf C. & S. F. R. Co.,* 98 Texas 6, 81 S. W. 20, which involved a release that recited injuries to the throat and breast by falling on a peg and further stated that, for the purpose of fully ending and determining any claim for damages that the releasor might have, he released the company from any and all manner of actions, suits, etc., whatsoever that he ever had or now had.

All issues in the case were submitted to the jury, who returned a general verdict for the defendant. The trial court left to the jury the question whether the parties intended by the release to include therein an injury to plaintiff's eyes, and on appeal the plaintiff contended the court should not have thus submitted to the jury the question as to the legal effect of the instrument but should have instructed as a matter of law that it did not embrace the injuries to the eyes for which damages were claimed. As to the issue before it, the court said:

> "This raises the question as to the construction of the instrument simply, and leaves out of view all questions as to want of consideration, mistake and fraud."

The court held that, construed by its language alone, the release was sufficiently broad to embrace all damages arising from the accident specified in the release, to wit, the falling on a peg.

Since the question of mistake was submitted to the jury and the plaintiff had not requested any submission as to fraud, these matters were held to have been concluded by the verdict. As to a statement made by the surgeon of the defendant that the injuries to the throat and breast were trifling the court, by way of dictum, said that this was only his medical opinion. This statement made in 1904 has been criticized in later cases, and certainly there can be no claim that the representations made in the case at bar were not statements of fact. Further, as is stated in the case of *Missouri, K. & T. Ry. Co. of Texas v. Haven,* 200 S. W. 1152 (Court of Civil Appeals of Texas) in referring to the remark of the court in the *Quebe* case, supra, the statement of the surgeon to Quebe was true in fact as a condition of the throat and breast, to which it applied.

The case of *Jacobson v. Chi., M. & St. P. Ry. Co.,* 132 Minn. 181, 156 N. W. 251, also cited in appellant's brief, strongly supports the rule for which we stand. In that case, the court very clearly based its decision on misrepresentation and fraud. This runs through the decision and especially appears from the following language:

> "It is fraud for one to make an unqualified representation not knowing whether it is true or false, and that an unqualified statement amounts to an affirmation as of one's own knowledge."

In holding that it makes no difference whether the statements were intentional or were known to be false by the party making them, the court further said:

> "A party cannot falsely assert a fact to be true and induce another to rely thereon to his prejudice,

and thereafter hide behind the claim that he did not know it was false at the time he made it."

The rule, supported as we have shown by the cases cited in appellant's brief, that, in a case where there have been untrue representations as to the injuries even though not known to be false by the party making them, which induced the execution of the release, and there was another injury that was falsely represented not to exist, the release, though it may in general terms embrace all unknown and unsuspected injuries, does not in fact or law cover such injuries or bar the right to recover therefor, is sustained by the authorities. This rule is supported by the case of *Atchison etc. Ry. Co. v. Peterson*, 34 Ariz. 292, 271 Pac. 406, which, while cited by us in the lower court, was by no means the only case upon which we there relied, as counsel would make it appear.

In this *Peterson* case the facts in favor of the plaintiff were not nearly so strong as the facts in favor of the plaintiffs in the case at bar in that the representations in the *Peterson* case were only as to the effects and duration of a known injury, while in the case at bar the representations were that there was no other injury when another very serious injury existed. In the *Peterson* case the lower court instructed the jury that it was not necessary that the representations were known to be false or that there was any wrongful intent on the part of the party who made them to deceive or defraud the plaintiff, and this instruction was upheld by the Arizona Supreme Court. In so doing, the court cited many authorities and said:

"It is true that, when actual fraud must be shown, as in the old common law action of deceit, no recovery

> can be had unless intentional deception appears, and many authorities hold to the strict application of this rule whenever relief is sought upon the ground of fraudulent representations; but, since an unintentional fraud often results in as great injury to the person defrauded as an intentional one, the courts have qualified the rule in such a way as to permit the granting of relief in actions whose purpose is to restore to a party that with which he has parted, and which are founded upon a contract induced and brought about by representations false in fact, though made in good faith."

Counsel for appellant claim that the *Peterson* case is distinguishable from the case at bar as the terms of the release were not given any consideration nor recited nor mentioned in the decision. In the second paragraph of the opinion the court states that Peterson signed a release document in which, for a consideration of $1,000, he released and discharged the railway company from all claims he then had or might thereafter have as a result of the injuries sustained by him. This release certainly was just as inclusive as the release in the case at bar, and it included and covered in words the claim upon which Peterson later brought the suit. However, by reason of the false representations it was held not to be a bar or defense to the suit.

The *Peterson* case, supra, was cited with approval in the case of *Matthews v. Atchison, T. & S. F. Ry. Co.*, 54 C. A. (2d) 549, 129 P. (2d) 435. In this case the release purported to release the defendant from any and all claims which he had or thereafter might have on account of the injuries in question, including any injuries that

might thereafter develop. This cannot be said to be any different from the release relied upon by the defendant in the case at bar. The court held that, if false statements were made to the plaintiff as to his injuries, it made no difference whether the party making the statements believed them to be true or not, and that the release in either event was not a bar to the action. It was further held that it was immaterial whether by its terms the release comprehended the damages sued for, and that the case of *Berry v. Struble,* 20 Cal. App. 299, 66 P. (2d) 746, on which the defendant relied, was not in point.

In the case of *F. Kiech Mfg. Co. v. James,* 164 Ark. 137, 261 S. W. 24, the release executed by the plaintiff recited that he released the defendant from all claims, demands, damages, etc., from any matter or thing whatsoever prior to the date thereof, and all other loss or damage resulting or to result from the accident. The release further stated that the releasor relied wholly upon his own judgment, and knowledge of the nature and extent of his injuries, disability and damage and that no representations or statements about them had induced him to make the settlement.

There was no attempt to prove any intentional fraud, and it was admitted that the untrue representation was made in good faith in the expression of an honest opinion that the injury was not permanent.

The court held that, if misrepresentations were made regarding the injury, whether they were intentionally or innocently made, the release was not a bar to the action and the plaintiff could recover. We quote the following

from Vol. 53, C. J., pp. 1216, 1217, par. 33, under the heading "Innocent Misrepresentation":

> "It is generally held that an innocent misrepresentation by the releasee or his agent of a material fact, intended to be acted upon by the releasor, and relied upon by him is effective to avoid a release induced thereby; thus a misrepresentation to the releasor by the physician employed by the releasee as to the releasor's injuries or physical condition, made in good faith and with no intention to deceive, and relied on by the releasor will be given such effect, particularly where the physician failed to exercise due care in ascertaining the facts on which he based his opinion. Such a misrepresentation has been held to constitute constructive fraud, or fraud in law."

Numerous cases supporting the foregoing are cited in the notes thereto.

Under both reason and the authorities, no matter how broad and inclusive the language of the release may be, it should not and cannot be held to cover unknown injuries, in a case where the releasor was led to believe that there were no unknown injuries and by reason thereof was induced to sign the release.

IV.

There was actual and intentional fraud on the part of the defendant.

That there was actual and intentional fraud in the matter of the substitution of releases clearly appears from the evidence, as we shall show. We also believe that, under the evidence, actual and intentional fraud in the making of the representations can very well be inferred. In this

connection we desire first to comment on several statements made in appellant's brief.

On page 36 it is stated that for the first three weeks Mrs. Zane was in the hospital, Cameron never discussed the matter of settlement and that he was merely solicitous of her welfare. Mrs. Zane's testimony was that, during the first three or four visits, although Cameron did not urge her to accept any settlement, he was preparing his ground, and wanted her to make an offer, that he told her of the other cases he had settled, and that he had settled the two death cases for $10,000 each (96, 135). She told him that she would not want to take $10,000. The evidence clearly shows that during the first several weeks the claim agent was laying the ground for the settlement, and that, while naturally solicitous, he was gaining her confidence. Having ascertained that she would not accept as low an amount as $10,000, he made his offer a little higher than that and offered her $12,000 (137).

Counsel for appellant on page 36 of their brief also state that Cameron would not deal with Mrs. Zane without the approval of her husband, that at all times he urged her to confer with him, and that he would not accept a release except one executed by the husband in his, Cameron's, presence. There was no evidence whatsoever upon which to base any of these statements.

It is also stated that there was no effort to isolate Mrs. Zane or to prevent her from consulting persons whom she desired to consult. No effort to isolate Mrs. Zane was necessary, since her condition resulting from the accident caused her to be isolated and to remain in the hospital under the care of and in contact only with the agents of

the defendant and without independent medical or legal advice. As to consulting persons, the evidence was that, when Mrs. Zane discussed the matter of having an attorney, the claim agent told her that probably she could get a better settlement by dealing with him personally (108). When the suggestion was made to the claim agent that Mrs. Zane be taken to Los Angeles for care and treatment, he advised that this was not necessary and that she be left with Dr. Blackman who was as good a doctor as there was in Los Angeles (196, 197).

On page 37 of their brief counsel for appellant state that, when Cameron accepted plaintiffs' offer, he went to Indio and, as the husband was not present, he left a form of release to be studied and discussed by them. There is no such evidence. The evidence is that Cameron left with Mrs. Zane a form of release all ready to be signed and that his instructions to her were that, in case her husband came in, for them to go before a Notary Public and sign the release in his presence (103). When Cameron returned to Indio he asked whether the release had been signed and was told that it had not (145).

It is also stated on page 37 of appellant's brief that Cameron made no effort to hurry the plaintiffs. The evidence is that when he returned on February 19th he was in a hurry to get the case closed and that he said he was apt to get in trouble with the head office. At that time he was quite disagreeable and told Mrs. Zane, who was crying, that the doctor said she was to be released from the hospital and there wasn't any reason for her not to sign the release (103, 198, 199, 242, 243).

Dr. Lytton-Smith did not testify, as stated on page

39 of appellant's brief, that, had he administered treatment to Mrs. Zane as described by Dr. Blackman, he would have reached the conclusion that there was no fracture of the hip. Dr. Lytton-Smith, in answer to a question of counsel for the defendant, only said that he would not take X-rays unless he thought they were necessary or unless his physical examination indicated an injury that required an X-ray. Dr. Lytton-Smith did, however, testify that if pain in the upper portion of the leg had been reported to him, he would have X-rayed the upper portion of her femur, and that he also would have taken an X-ray if it had been reported to him that the right portion of Mrs. Zane's leg above the knee was two inches shorter than the left one (230-233). His testimony also very clearly shows that the hip was fractured as a result of the bus accident (213), and that this fracture was easily discernible (222).

Mrs. Zane was in the hospital almost three months and she was visited by Cameron, the claim agent, about once a week for the first several weeks and later so often that she could not enumerate the times (135, 139). The evidence shows that Mrs. Zane almost continuously suffered pain in her upper leg, hip and knee and that she complained of this to the doctor (107, 131, 321). No X-rays of the upper leg were taken (107). When measurements were made for an artificial limb it was found that the upper portion of the right leg was about two inches shorter than the upper portion of the left leg and, upon this being reported to the doctor, he still told Mrs. Zane that there was nothing the matter with her hip, that she was just lazy, and that, if she would exercise a little, she would get where she could use the artificial leg (113-115).

The claim agent told Mrs. Zane that, any time that Dr. Blackman said that she could settle and that she was all right, she could take his word for it (98). Prior to the settlement Dr. Blackman and Cameron were both in Mrs. Zane's room and told her of the people they knew that had artificial limbs, and that as soon as she was up and had her strength back she would be able to wear an artificial limb and be as good as new (106). Dr. Blackman brought Mrs. Zane a pamphlet showing a party who had an artificial limb high-jumping and said that she would be able to do the same as soon as she was up and could wear an artificial limb (106). In his deposition taken by the defendant and introduced in evidence by it, Dr. Blackman without objection on the part of the defendant testified to the same effect and that he showed Mrs. Zane a folder advertising a type of artificial limb and showing a man sprinting, or dancing, and doing various stunts with it (401). He further testified on examination by counsel for the defendant that he assured Mrs. Zane that there was no evidence of any other serious injuries at all other than the foot and leg that she lost (385). From his testimony introduced by the defendant it is apparent that the doctor led Mrs. Zane to believe that she would be able to use an artificial limb and to become adept in its use (384, 385, 401).

By Section 1572 of the California Civil Code actual fraud is stated to consist, among other things, of the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, or of any other act fitted to deceive. The statements and representations made

to the plaintiffs are very clearly within this definition in that they were made positively and unqualifiedly and without sufficient basis therefor, and were fitted to deceive, and also in view of the situation of the parties and the confidential relationship existing between them. *Viallet v. Consolidated R. & Power Company,* 30 Utah 260, 84 P. 496.

In the matter of the substitution of the release, the evidence is very strong and undisputed that actual and intentional fraud was practiced upon the plaintiffs, as a result of which the release signed by them was not the release they understood and believed they were signing.

The evidence is that the claim agent, a week or so before any release was signed, left with Mrs. Zane a release all made out and ready to be signed in which the consideration was stated to be $14,500, and in which the injuries resulting from the accident were stated to be the loss of the right foot and lower leg. This release was left by the claim agent with Mrs. Zane with instructions that, in case her husband came back while he was not there, they should sign it before a notary (100-103, 140-141, 175-180, 239). The evidence further is that when the claim agent returned to the hospital on February 19, 1943, a week or so later, this release had not been signed, since Mr. Zane had not been there in the meantime and only arrived that day, and that the claim agent took the release that he had theretofore left with Mrs. Zane and said he was going to the office (103, 141). When he returned to the room, he handed the plaintiffs a release to sign which they naturally believed was the release that previously had been left with Mrs. Zane, and were

so led to believe (103, 141). The release that was so signed under this misapprehension stated the consideration to be $15,967, and the injuries that resulted from the accident to be personal injury and property damage.

The evidence also is that when the claim agent returned on February 19 he was in a hurry to get the deal closed, and said that he had spent so much time on the case, and that there was no reason for not signing the release (103, 198, 199).

That the release that was signed was not the release that had been left with Mrs. Zane and that the plaintiffs were led to believe and did believe they were signing, is clear. The hospital and doctor's charges were on a day to day basis (145) and they could not possibly have been known or computed at the time the release was left with Mrs. Zane, as it was not then known when the release would be signed. Therefore, the release that was signed was clearly a new release in which the amount and the statement of injuries was inserted by the claim agent that day and, unknown to the plaintiffs, this release was substituted by the claim agent, as very easily could have been done. The evidence as to this matter, contrary to the claim of appellant's counsel, is clear, convincing and satisfactory. The fact that the release left with Mrs. Zane did not mention the injury to the left ankle is easily explainable as this injury was comparatively unimportant and was only temporary, having healed within two weeks after the accident (179, 180).

The defendant, by having Mrs. Zane fill out in the form of release the amount and the description of the injuries as they were written and contained in the release that

had been left with her by the claim agent, and by introducing in evidence this form so filled in, made the evidence of the substitution even more convincing and adopted the same (176-178).

The substituted release, by stating the amount to be $15,967 made it appear that the plaintiffs in addition to the $14,500 were being paid the amount of the hospital and doctor's bill and that they were paying this bill, while the true situation was that the defendant paid the hospital and doctor's bill, as Mrs. Zane had been told it would do and as the separate check and the receipt of the hospital show. The fact that Mrs. Zane included this in her wire offering settlement is fully explained by the dispute she heard between the claim agent and doctor as to the amount of the bill as, in view of this, naturally she did not want any question to arise concerning it.

A still more important difference in the two releases is that the release left with Mrs. Zane and that the plaintiffs thought they were signing particularly and specifically described the injuries resulting from the accident to be the loss of the right foot and lower leg, while the release that was signed stated the accident to have resulted in personal injury and property damage. This difference certainly is most material, and the fact that the written specific description was followed by the general printed clause concerning all injuries known or unknown, etc., does not make it any less so.

The recital of the injuries resulting from the accident in the releases was written in. In the case of the release left with Mrs. Zane this was stated in writing to have been the loss of the right foot and lower leg. The clauses following were printed.

The authorities hold that when, in a release, there is a particular recital that is followed by general words, the general words are limited and restricted by the particular recital, and that this is especially true where the general words are printed and the particular recitals are written in.

53 Corpus Juris, pages 1241, 1242, par. 61;

45 Am. Jur., pages 693, 694, par. 29;

Texas P. & R. Co. v. Dashiell, 198 U. S. 521, 49 L. Ed. 1150; 25 S. Ct. Rep. 737;

Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L.R.A. 581 (C.C.A. 8th Cir.);

Lumley v. Wabash R. Co., 76 Fed. 66 (C.C.A. 6th).

There can be no question that the release that the plaintiffs, by reason of the deception and fraud practiced upon them, were caused to believe they were signing would not, under any circumstances, be any bar to the recovery for injuries not mentioned in the release and that later were discovered.

It further is to be noted that in this case, like the case of *Backus v. Sessions,* 17 Cal. (2d) 380, 110 P. (2d) 51, which we hereinbefore have cited, in addition to the separate release, there was a release in connection with the draft which did not contain the clauses of the separate release. Although the *Backus v. Sessions* case did not involve a substitution of releases, under the holding of the court in that case and the principles there laid down, the plaintiffs in the case at bar, by reason of the substitution, very clearly can recover for the unknown injury.

This is true under any theory that may be taken, and it further is fully sustained by the case of *Jordan v. Guerra,* 23 Cal. (2d) 469, 144 P. (2d) 349.

V.

The evidence was competent and sufficient that false representations were made by agents of the defendant upon which plaintiffs were entitled to rely, and there was no hearsay testimony on behalf of plaintiffs that was harmful or prejudicial to the defendant.

We shall here deal with paragraphs III and V of appellant's argument.

The case of *U. S. Smelting, etc., Co. v. Wallapai Mining Development Co.*, 27 Ariz. 126, 230 P. 1109, cited by appellant, involved a written contract signed by an individual, who, it was claimed by the plaintiff, was the agent of two corporations in the making of the contract, one of which was not then in existence. As to the other company, the only evidence was that he was general manager of the company, and some letter-heads of the company. The court, of course, held the evidence of agency insufficient. In the opinion, the court stated the general rule that the agency must be proved by other evidence before the agent's acts and declarations can be shown against the principal. There is, however, nothing whatsoever in the opinion of the court opposed to the rule laid down by the authorities that, when there is other proof of agency, the acts and statements of the agent become admissible in connection with, and in corroboration of, such other evidence, where they are made at the time and as part of the transaction in question, and that the order of proof in which they may be admitted is in the discretion of the court.

2 C. J., pages 939, 940, pars. 694, 695;

3 C. J. S., pages 280, 281, par. 322;

First Unitarian Society of Chicago v. Faulkner, 91 U. S. 413; 23 L. Ed. 283;

Hope Mining Co. v. Burger, 37 Cal. App. 239, 174 P. 932;

Paff v. Ottinger, 23 Cal. App. 439, 163 P. 230;

Dooley v. West American Commercial Ins. Co., 133 Cal. App. 58, 23 P. (2d) 766.

In the other Arizona case cited in appellant's brief, *Bristol v. Moser,* 55 Ariz. 185, 99 P. (2d) 706, the court very clearly recognizes and states the rule that an agency is not required to be proved by direct testimony, but is susceptible of proof as is any other fact, and may be established from the circumstances, such as the relation of the parties to each other and to the subject matter, and their acts and conduct. *Little v. Brown,* 40 Ariz. 206, 11 P. (2d) 610. The liberal rule adopted by the courts as to the admissibility of evidence in proof of agency is stated in Vol. 3, C. J. S., page 273, par. 322, as follows:

> "Even though it is not full and satisfactory, or is only remotely relevant, any competent evidence which has a tendency to prove or disprove agency is admissible for that purpose, regardless of whether it is oral or written, or is direct, indirect, or circumstantial."

On page 688 of 45 Am. Jur., cited by appellant, is the following:

> "Attending physicians or surgeons of a party responsible for an injury may, it seems, be regarded as authorized to advise the injured party as to the nature or extent of his injuries, so that the releasee will be bound thereby."

That all the circumstances in a case of this kind can be brought out to show the relationship of the parties is shown by the case of *Wilson v. San Francisco-Oakland Terminal Rys.*, 48 Cal. App. 343, 191 P. 975, and also in the later case of *Jordan v. Guerra,* 23 Cal. (2d) 469, 144 P. (2d) 349.

In the *Wilson* case, supra, the court said:

> "If the release relied upon by the defendant corporation to defeat plaintiff's action was the product of such methods, plaintiff should have been allowed to prove it. Whether or not there was any existing relation between Norwood and Mills was one of the questions for the jury to decide after hearing all of the circumstances surrounding the transaction. * * * Norwood was obviously not acting in behalf of plaintiff. The jury, then, had a right to know what his interest was, and the extent of it, and the reason for his asserted false statements to plaintiff, if he did in fact make any. Plaintiff should have been permitted to present all these circumstances to the jury in order to prove, if she could, that the unusual activities of Norwood could be accounted for on no other hypothesis than that he was the agent of the defendant corporation. It would make little difference whether it was shown he was an authorized or self-constituted agent of the defendant corporation, because, in either event, if an impecunious settlement was brought about through his trickery or falsehood, the defendant corporation should not be allowed to take advantage of an unfair settlement thus made, accept the benefit thereof and deprive plaintiff of a trial upon the real merits of the case. Wilder v. Beede, 119 Cal. 646, 51 Pac. 1083; Pope v. J. K. Armsby Co., 11 Cal. 159, 43 Pac. 589; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Shoninger v. Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88."

The rule that, where a fraud is alleged, great latitude is allowed in the admission of evidence is stated in 20 Am. Jur., p. 320, section 345, as follows:

> "Whenever issues of duress, undue influence, fraud, and good faith are raised, the evidence must take a rather wide range and may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions. Such matters are ordinarily not the subject of direct proof, but to be inferred from the circumstances, and in all such cases, great latitude of proof is allowed and every fact or circumstance from which a legal inference of the fact in issue may be drawn is competent. The courts generally are liberal in admitting evidence of even slight circumstances tending to throw light upon the relation of the parties and their dealings with each other."

There can, of course, be no question whatsoever as to the agency of Cameron, the claim agent, who was in charge of the case for considerably more than two months, to represent the defendant in all matters having anything to do with the handling and settlement of the case, including the employment of the physician, and the plaintiffs had the right to assume that he had the authority assumed by him. *Rich v. Edison Electric Co.,* 18 Cal. App. 354, 123 P. 230; *Edmunds v. Southern Pac. Co.,* 18 Cal. App. 532, 123 P. 881.

As to Dr. Blackman, there is, we believe, also no question that the circumstances, including his own testimony introduced by the defendant, were amply sufficient to show the agency.

As a result of the negligence of the defendant, Mrs. Zane was taken to the Indio hospital, which was operated by Dr. Blackman, without any direction or choice on her part, and without even knowing where she was being taken (89). She made no arrangements for her care or treatment at the hospital and was not presented with any bills (104, 105). It is clear that she did not employ Dr. Blackman or the hospital, and that he was not her physician.

On the other hand, the evidence of the defendant shows a close relationship between the defendant and Dr. Blackman (347, 354). In the case of the care and treatment of patients injured in previous Greyhound bus accidents the bills were paid by the Greyhound (398). Immediately after the operation Mrs. Zane, without any direction or arrangement on her part, was taken to a private room which she occupied for more than two months at great expense. It is inconceivable that this would have been done unless the Greyhound made arrangements for her care and treatment. In this connection the Superintendent of the defendant was at the hospital shortly after the accident (344). It is apparent that some arrangements were made for the hospital bill. Mrs. Zane was without funds to pay anything and so told the hospital. Again we repeat that it is inconceivable that a small country hospital would keep a patient for ten weeks in a private room unless some arrangements had been made for her care.

The story of Dr. Blackman as to the arrangement for the care and treatment of Mrs. Zane is most improbable. Certainly, as the plaintiffs had made no arrangement or agreement for her care and treatment and had not been consulted with respect to the private room or the other

large expense that was incurred, there would have been no right to have the payment for this taken out of a settlement, and it is not believable that such an indefinite and contingent arrangement would have been relied upon. Such an arrangement would, however, have made the doctor and the hospital greatly interested in helping the defendant to make a settlement.

The claim agent told Mrs. Zane that Dr. Blackman was their doctor (98), and that the defendant was taking care of the bills (95, 134).

That the defendant arranged with Dr. Blackman for the care and treatment of Mrs. Zane is further proved by the dispute between Mr. Cameron and Dr. Blackman regarding a claimed agreement as to the amount of the bill, which was testified to both by Mrs. Zane and Dr. Blackman himself (111, 112, 388, 389). This dispute conclusively shows that there was an employment by the defendant of the hospital and Dr. Blackman and that they were its agents.

The hospital and doctor's bill was paid by the appellant, and the receipt of the hospital for hospitalization and doctor's care of Mrs. Zane was issued to the appellant and given to it (118, 119).

It is to be noted that the claim agent not only repeated to Mrs. Zane what the doctor had said regarding the injuries, and assured her that she could rely upon this, but also made to her the same representations without reference to the statements of the doctor, and that this was the basis upon which the amount of the settlement was discussed (98). The misrepresentations of the claim agent alone were sufficient to entitle the plaintiffs to recover.

In view of all these facts and circumstances, it clearly appears that Dr. Blackman and the hospital were the agents of the defendant and that they were handling the case of Mrs. Zane for it.

The claim of the appellant that the court allowed hearsay evidence to be introduced that was harmful and prejudicial to the defendant cannot, we submit, be sustained. Certainly, no claim can be made that any of the statements of Cameron, the claim agent, were hearsay. All of his statements were made in the performance of and in connection with his duties for the defendant and pertained to the duties of his agency. All of them were made in connection with and as a part of his settlement negotiations.

3 C. J. S., page 281, par. 322;
Williamson v. Taylor, 129 S. C. 400, 124 S. E. 645.

Since the evidence shows that Dr. Blackman was the agent of the defendant in taking care of Mrs. Zane, his statements cannot be said to be hearsay, and the same applies to the statement of the nurse regarding payment of the bills to which the appellant has objected, which was made in the course of the duties she was performing for the defendant. A statement to the same effect was made by the claim agent (95), which cannot be claimed to have been hearsay, and the evidence shows that the defendant did pay the bills (118, 119, 396). In any event the testimony to which objection has been made was simply cumulative and corroborative, and it is uniformly held by the authorities that any error in the admission of hearsay evidence is deemed to be harmless

and non-prejudicial where such evidence is cumulative or corroborative.

5 C. J. S., page 997, par. 1727;

3 Am. Jur., page 581, par. 1028.

In this connection, counsel for the defendant in their cross examination brought out independently the same evidence of which they complain. In their cross-examination of Mrs. Zane, in reply to a question as to whether Cameron, the first time or two he came was just friendly, she replied:

> "Yes, and he assured me there was nothing to worry about, and that they were taking care of all the bills. All I had to do was to get well." (134).

No objection to this answer or motion in respect thereto was made.

In other respects counsel elicited evidence of agency in their cross-examination. On page 130 of the Transcript of Record it was brought out that Dr. Blackman and Cameron told Mrs. Zane that the Pacific Greyhound Lines was going to pay all the medical bills and the cost of the operation, and that Dr. Blackman told her that the second operation was to make her leg suitable for an artificial limb. 5 C. J. S., page 1018, par. 1735.

It was further brought out on cross-examination that the nurse brought Cameron in and introduced him as an agent from the Greyhound, and that he also gave her a card that had his name on it which said "Claims Agent", or something of that sort, of the Pacific Greyhound Lines.

Also, the defendant took and introduced in evidence the deposition of Dr. Blackman. His statement that the bills would be taken care of by the Greyhound was admissible,

in addition to the other reasons, to impeach the testimony in the deposition as to his arrangement with the defendant.

4 C.J., page 984, par. 2964, note 64(b).

On this matter of agency the authorities hold that a person who adopts and accepts a release and the benefits accruing therefrom, and claims under it, thereby adopts and ratifies the means and instrumentalities by which the release was obtained. Thus, in the case of *Moses v. Carver,* 298 N. Y. Supp. 378, 164 Misc. 204, cited and relied upon by appellant, the husband of the plaintiff was in no sense the agent of the defendant, but was instrumental in obtaining the plaintiff's signature. The court said:

> "The defendant having accepted the result of the efforts of the husband of the plaintiff, is deemed to have adopted the methods employed to achieve those results. Taylor v. Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L.R.A. 783, 95 A. S. R. 64; Bloomquist v. Farson, supra, 222 N. Y. 375 at page 381; Parton v. Metropolitan Life Ins. Co., 129 Misc. 493, 221 N. Y. S. 610."

In the case of *Chicago R. I. & P. Co. v. Burke,* 175 P. 548 (Okla.) it was held that by adopting and pleading the release, the defendant ratified the act of the surgeon in making the statement to the plaintiff, so as to present an issue of fact whether the release was void for constructive fraud.

A leading case is that of *Bertha v. Regal Motor Car Co.,* 180 Mich. 51, 146 N. W. 389, in which the court said:

> "It is a proposition of law too fundamental and too well established to require a citation of authorities that,

if a party adopts even unauthorized acts of another and has received and accepted benefits accruing therefrom, he thereby adopts and ratifies the instrumentalities by which the results were obtained, and is estopped from denying that the agent was authorized to act. So in this case, by accepting this release, which upon its face is prima facie a release in its favor and for its sole benefit, by pleading the release as a defense to the suit, by refusing to accept the tender back of money which has been paid to secure the release, by its course of cross-examination to show that it had obtained the release and claiming the benefits of it, by admitting in open court that it had paid Dr. Goux for his services in caring for plaintiff, defendant must be held to have adopted and ratified the acts of the two representatives of the insurance company."

VI.

No notification of rescission or repayment or tender of repayment of the money received for the release was required.

It is argued by counsel for appellant (page 45 of its brief) that it was necessary to notify the defendant of a rescission of the release and that the retention by them of the consideration estopped them from recovery in the case. We think not.

At the time of the settlement and the execution of the release the plaintiffs, by reason of the representations made to them, believed that Mrs. Zane's only injury was the injury to her right foot and lower leg that necessitated the amputation, and this was the only injury that was given any consideration by the parties prior to or at the time of the settlement (98, 107, 108). No recovery is

sought in this action for that injury. The only recovery that is sought is for the injury to the femur or thigh bone which, by reason of the mistake and misrepresentations, was not covered by the release. The release stands as to the injury to the loss of the foot and lower leg.

In such a case there was no necessity for any notice of rescission or repayment, and the authorities cited in appellant's brief have no application. They simply state the general rule in cases where a complete rescission is claimed and suit is brought to recover for all injuries resulting from the accident. This was the situation in the case of *Chicago, etc., Ry. Co. v. Pierce,* 64 Fed. 293, and also in the case of *Colorado Springs and I. Ry. Co. v. Huntling,* 66 Colo. 515, 181 P. 129, cited by appellant.

In the latter case it appears from the opinion that the plaintiff knew all about her injuries at the time she cashed the check. It does not appear at all that there was another distinct injury which was unknown or which it had been represented did not exist. It appears that the plaintiff claimed only that the injury was worse than she had been told it was. She sued for full recovery for her injury, entirely repudiating the release. The distinction between this case and the case at bar is plain. In the case at bar there were two distinct injuries, one of which, by reason of the misrepresentations, the plaintiffs at the time of the settlement believed to be the only injury and for which, therefore, the settlement really was made, and the other of which the plaintiffs were caused to believe did not exist. They seek damages only on account of the unknown injury and claim that the release rightly should be limited to the injury which they were caused to believe was the only injury. In such a case

the authorities hold that no rescission or notice or payment back of money is required.

In the case of *Great Northern Ry. Co. v. Reid,* supra, there was a known injury to the foot, and one of the results of the accident was a hernia, which was not known and consequently was not taken into consideration when the plaintiff settled with the claim agent and gave the release. In reference to this, the court said:

> "We think that, under the authorities, there is here sufficient to impeach the settlement so far as it relates to this phase of the controversy and to that extent the release should be set aside.
>
> "We agree with the court below that it should not be disturbed as it respects the injury to his foot. Lumley v. Wabash R. Co., supra, is authority for the partial impeachment of the release."

In the case of *Lumley v. Wabash Ry. Co.,* 76 Fed. 66 (C.C.A. 6th Cir.) in which a similar state of facts was involved, Judge Lurton, in an opinion concurred in by Judges Taft and Hammond, said:

> "In this aspect of the case it is a matter of no importance whether the plaintiff paid back or offered to pay back the money he received. He did, in fact, tender it back some three years after he received it. This delay is unimportant, as the statutes of limitations have not barred his suit, and he was entitled to retain it as a satisfaction for the part of his injury he had understandingly settled."

In the case of *Atchison, etc., R. Co. v. Peterson,* supra, it was held that no return of the amount paid for the release, or a tender thereof, was required. In that case there was only one injury and the representation

was as to its duration. The plaintiff, therefore, necessarily, sued for all damages resulting from the single injury. In the case at bar, as in the cases above cited, there were two separate and distinct injuries and the plaintiffs sued only for the injury that was not believed to exist at the time of the settlement.

The rule is stated in 53 C. J. 1237 as follows:

> "The consideration for the release need not be returned where an action is brought upon a claim not in contemplation at the time of the execution of the release."

A well reasoned case on the question is *Malloy v. Chicago Great Western R. Co.,* 185 Iowa 346, 170 N. W. 481, stated in the footnotes of the above quotation:

> "Where the amount paid was for some specified injury or for loss of time or the like and it is sought in the action to recover for some additional injury not contemplated in the contract of release or for damages consequent on injuries necessarily excluded in computing the consideration paid for the release, as where such payment was for loss of time only, or specific items other than injuries on which the action is based, then and in such event tender of return of the consideration is not essential to the maintenance of the action. This is for the reason that, as to the amount paid * * * the releasee has the benefit of what he has paid for, and the releasor may not recover therefor again."

In the *Hanson v. Northern States Power Co.,* 268 N. W. 642, cited in appellant's brief, the court in reference to the defense of laches interposed by the defendant said:

> "It is clear that the question of laches has no proper place in this discussion. Plaintiff brought her

suit within six years of the time of the accident, the period of the statute of limitations, and there is no ground upon which the claim of laches can be passed."

The following additional authorities sustain our position on the matter of rescission and the retention of the consideration received for the release:

Backus v. Sessions, et al., 17 Cal. (2d) 380, 110 P. (2d) 51;

Gay v. D. M. Osborn Co., 102 Wis. 641, 78 N. W. 1079;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 P. (2d) 349;

Bliss v. New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65.

Under the Arizona and California cases no tender of consideration is necessary under the facts here involved. It is argued by counsel for appellant that defendant was unable to produce Cameron as a witness by reason of the fact that the plaintiffs did not notify the defendant. Even if material, which we deny, there is no competent evidence in the record to show this, and no competent evidence that Cameron's testimony could not be had. It would seem quite likely that the defendant did not desire the claim agent's testimony.

Considerable space in appellant's brief is devoted to the matter of expenditures made by the plaintiffs. Under the law of the case, this has no bearing. The evidence, however, shows that Mrs. Zane invested in war bonds, purchased a home, and spent a considerable amount for help and doctor's bills on account of the injury which she was told did not exist.

VII.

The court did not err in giving instructions to the jury at the request of the plaintiffs.

Counsel for appellant under paragraph VI of their argument first complain of the giving of plaintiffs' requested instructions Nos. 2 and 5, which appear on pages 447-449 of the Transcript of Record. These instructions correctly stated the law in a case such as this involving representations as to the injuries made to the plaintiffs which were untrue and which caused them to execute the release. The instructions in all respects are in accordance with the law as set forth in paragraph III of this argument and are fully sustained by the authorities therein cited. The same instruction in substance was expressly sustained in the Arizona case of *Atchison, etc., Ry Co. v. Peterson*, supra, the doctrine of which case was fully approved in the California case of *Matthews v. Atchison, T. & S. F. Ry. Co.*, supra.

Since these instructions were predicated on a finding by the jury of false representations inducing the execution of the release, the instructions covered the law of the case and were complete without any further submissions in connection therewith, which would have been improper. Further, no such submissions were requested.

Appellant also complains of these instructions for the reason that they permit recovery for the injury that it was represented Mrs. Zane did not have instead of recovery for all the injuries sustained in the accident. This phase of the case has been fully dealt with and covered in paragraph VI of this argument, and the authorities therein cited sustain in all respects the recovery for the

distinct and separate injury under the conditions set forth in these instructions.

The next instruction to which counsel for appellant object is plaintiffs' requested instruction No. 6 which, as given by the court, appears on pages 449-450 of the Transcript of Record, and which has to do with the matter of the substitution of releases. As we have shown in paragraph IV of this argument, the evidence was amply sufficient to support this instruction. It also is the case that the instruction was full and complete. By it the court did not, as claimed by appellant, instruct the jury that, if the release executed by the plaintiffs was somewhat different from the form of release originally submitted, the jury should find for the plaintiffs, nor did the court by the instruction charge the jury that if there was any difference whatsoever between the two releases, the jury should so find. The instruction set forth the exact differences between the two releases as testified to by Mrs. Zane. There can be no question that, if the release as originally submitted and which the plaintiffs were led to believe they were signing stated the injuries sustained to have been the loss of the right foot and lower leg, this was very materially different from the release that was signed, as is shown in paragraph IV of this argument.

The court did not, as stated in appellant's brief, in this instruction tell the jury that the executed release was wholly void, but on the other hand, told the jury that, if the jury found from a preponderance of the evidence the matters set forth in the instruction, the release was no defense to the action and its verdict should be for the plaintiffs for the damages sustained as a result of the

injury to the femur, this being the other distinct injury not mentioned in the release as submitted. There was no error in the giving of this instruction. If the claim agent led the plaintiffs to believe that they were signing a release that set forth specific injuries, certainly, under the authorities the release that was signed could only have the effect of the release which the plaintiffs were led to believe they were signing, and would serve only as a release so far as the specified injuries were concerned. The plaintiffs therefore still would have the right to sue, as they here did, by reason of the hip or thigh bone injury which was not, as is shown in our paragraph IV above, covered by the release. This is fully sustained by the authorities above cited in paragraph VI of this argument.

It is to be noted that in the court below counsel for appellant did not base their objection to this requested instruction No. 6 on any of the grounds stated in their brief (461, 462).

Counsel for appellant next complain of the giving of plaintiffs' requested instruction No. 10 concerning the measure of damages (450-451). They state that, although plaintiffs sought to set aside a release on the grounds of fraud, they could claim that such release was set aside only in part. This is not an action to set aside a release, but is an action to recover damages on account of an injury which, by reason of the acts of the defendant should not be held to have been covered by the release. That this instruction correctly states the law as to the measure and assessment of damages under the state of facts here involved is held and sustained by the authorities cited in paragraph VI of our argument to which we have referred.

In several places in their brief counsel have stated that the defendant paid the plaintiffs $15,967.00, this being the sum of the two amounts of $14,500 received by the plaintiffs and the sum of $1467 received by the hospital. The amount paid by the defendant to the plaintiffs was $14,500. The $1467.00 was paid by the defendant to the hospital and its receipt stating that it had received from the defendant this amount for hospitalization and doctor's care was issued by the hospital to the defendant. As the evidence shows, there was no arrangement whatsoever between the plaintiffs and the doctor or hospital, the plaintiffs were not consulted as to the charges or expenses to be incurred, and they were never presented with any bills for care or treatment.

VIII.

The court did not err in refusing instructions requested by the defendant.

Appellant's first complaint as to the refusal of the court to give certain instructions requested by it has to do with its requested instruction No. 2 (49). For several reasons there was no error in refusing to give this instruction. In the first place, there is no evidence whatsoever upon which to base the submission to the jury of a question as to whether Mrs. Zane attached her signature to the release carelessly or with indifference to her rights.

It cannot be claimed that there was any carelessness or indifference on the part of Mrs. Zane by reason of the fact that she signed a release that was different from the one that had previously been left with her and that

she was led to believe was the release she was signing. Certainly she was justified in assuming and taking it for granted that no release other than the release left with her was being presented for her signature. Counsel for appellant state that it is admitted that the terms of the release were discussed. The only evidence as to a discussion of the terms of the release was that the terms of the release were discussed between Mrs. Zane and her husband and this clearly had reference to the release that had been left by Cameron with Mrs. Zane (145).

There also was nothing upon which to base the submission of the question whether she knew generally that the effect of the release was to bar her right to sue for any injuries although she did not know or suspect such injuries. Since, under all the evidence, the execution of the release was induced and caused by the misrepresentations of the defendant, it could not possibly, under the authorities, have that effect.

Further, the requested instruction entirely disregards the law that, no matter what the provisions the release may contain, it cannot be upheld as covering all injuries if its execution was brought about by misrepresentations on the part of the release although unintentionally made. That this is the law is shown by the authorities cited in paragraph III of this argument, including the case of *Moses v. Carver,* supra, cited and relied upon by appellant itself. A person cannot be claimed to have intended that a release should have the effect of barring a cause of action for an injury that she did not believe she had when the reason for this belief was the result of positive representations made to her by the releasee.

As to appellant's complaint because of the refusal of the court to give its requested instruction No. 6 (53) to the effect that the plaintiffs could not recover unless the falsity of the representations was known to the party making them at the time they were made, we have fully covered this phase of the matter, and under the authorities, there was no error in the refusal of the Court to give this instruction.

There was no error in the refusal of the Court to give defendant's instruction No. 9 (55), to the effect that, although the relation of principal and agent existed to some extent between the defendant and Dr. Blackman, unless he had authority to represent the defendant in the negotiation of a settlement, any statements made by him not for the purpose of influencing a settlement subsequently negotiated by an agent of the defendant without knowledge on the agent's part of the statements, could not avoid the release.

First, the evidence is clear and without question or dispute that the claim agent had knowledge of the statements of Dr. Blackman regarding the injuries and that he used, adopted and took advantage of the statements in negotiating and effecting the settlement. The evidence also is clear and without question or dispute that the doctor knew that negotiations for a settlement were being had and that a settlement was contemplated. Under such circumstances, practically all the cases hold it to be unnecessary that the doctor was authorized to negotiate the settlement. There was nothing to warrant the giving of this requested instruction.

Defendant's requested instruction Nos. 13 (57) and 14 (58), which had to do with the matter of rescission and of

repayment of the consideration received for the release, and with the matter of giving the plaintiff credit for the amount paid, were properly refused by the court for the reason that no rescission, notice of rescission, repayment of the consideration, or crediting of the payment made, is necessary or proper in a case involving the facts in the case at bar. This we believe to be clear for the reasons given and from the authorities cited in paragraph VI of this argument dealing with those matters, which it would seem unnecessary here to repeat.

IX.

The court's instructions to the jury were not conflicting, confusing or repetitious.

We fail to find any conflict in the instructions given by the court or that the instructions in any manner were confusing or repetitious. Only six of the instructions requested by the plaintiffs were given, while the court gave eight of the defendant's requested instructions, either as originally drawn or modified. As to the complaint that the court did not further instruct the jury as to the grounds on which the plaintiffs sought recovery, not only was this unnecessary in view of the instructions that were given, but also no request was made by the defendant for further or additional instructions regarding this. If the defendant desired such further instructions it was its duty to request them, 3 Am. Jur. 645, Par. 1127.

V.

CONCLUSION

We submit that the court committed no error in denying defendant's alternative motion for a new trial as argued on page 61 of appellant's brief and, further, that the defendant was ably defended and had the advantage of every right that it was entitled to.

We submit that the defendant did not produce a single witness who had a personal knowledge of the facts that denied the evidence produced by the plaintiffs at the trial except possibly Dr. Blackman and an impartial study of his testimony greatly corroborates the case of plaintiffs.

Mr. Frazee Burke testified that he was assistant manager of the Claims Department of the Western Adjusting Bureau and that Swett and Crawford, whoever they were, owned that corporation; that the Western Adjusting Bureau investigated and adjusted claims for the Pacific Greyhound Lines (327, 335). Burke had the temerity to testify that Cameron was not even an employee of the Greyhound Lines (336, 337) yet the record shows without dispute that he was known in Indio, California, as an adjuster for the Pacific Greyhound Lines and that he was constantly in touch with the plaintiff Zoa H. Zane for a period of nearly three months. If he was not an adjuster for the Greyhound he certainly had everyone in the vicinity of Indio greatly fooled. It would be strange logic indeed for an adjuster to do the things that Cameron did for the Greyhound and then claim that he was not in its employ. The other evidence produced by the defendant was just as logical as the claim that Cameron was not in the employ of the Greyhound.

We do not wish to be melodramatic but we submit that the evidence shows without dispute that the plaintiff Zoa H. Zane, a young woman, mother of two children, suffered an injury due to the negligence of the Greyhound and her right leg was amputated below the knee and that she settled for this injury and the Greyhound got what it bargained for, a settlement of this claim, and had it not been for the fraud and representation of the defendant, its agents and servants, Zoa H. Zane could at least have worn an artificial limb and been half-way normal but due to the fraud, both actual and constructive, Zoa H. Zane was made a hopeless cripple for the remainder of her natural lifetime, to walk around on crutches with her thigh bone moving up and down. We submit that she cannot take even one step, even around the house, without crutches and that she will suffer pain the rest of her natural lifetime.

It is argued by the appellant in its brief that the delay in bringing the suit caused irreparable injury to the defendant. The plaintiffs brought their suit within the statute of limitations which they had a right to do.

The defendant lays great stress on the fact that the plaintiffs spent some of their money for a few luxuries; the defendant even brought out the fact that while her husband was in the Navy fighting for his country for a period of nearly a year Zoa H. Zane hired some help to take care of herself and two children. Whatever Mrs. Zane did with her money she paid for it by having her right leg amputated and she could have done what she pleased with it.

We submit that Zoa H. Zane has never been paid for her fractured hip for which this suit was brought and

that the judgment recovered only partly compensated her for the injuries that she has suffered.

We further submit there is no prejudicial error in the record, that the plaintiffs are entitled to recover and that the judgment of the District Court should be affirmed.

Respectfully, submitted,

Terrence A. Carson
Stahl and Murphy
By Floyd M. Stahl
John A. Murphy
Attorneys for Appellees.